

In so far as the first offence is concerned the punishment prescribed is a fine not exceeding \$1,000 or imprisonment for a term not exceeding one year or to both such fine and imprisonment. Since the term of imprisonment prescribed exceeds three months the Magistrate had no power to accept a plea of guilty by post and therefore the conviction on the first charge must be quashed and the charge remitted to the Magistrate to take the plea of the appellant in person.

In so far as the second offence is concerned the penalties therefor are set out in sub-section 2 of section 74 of the Road Traffic Ordinance which reads as follows:

"If a person acts in contravention of this section, he shall be liable to imprisonment for a term not exceeding three months or to a fine not exceeding one thousand dollars or to both such imprisonment and fine, and a person convicted of an offence under this section shall, unless the court for special reasons to be specified in the order thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification, be disqualified for holding or obtaining a driving licence under Part II of this Ordinance for a period of twelve months from the date of the conviction."

In so far as the fine and the imprisonment are concerned neither are outside the limits imposed by sub-section (ii) of section 137 of the Criminal Procedure Code. The offence, however, does include an automatic disqualification for holding a driving licence unless special reasons are found to exist. In this particular case there was a definite order of the Court for disqualification. Under sub-section (ii) of section 137 of the Criminal Procedure Code the Magistrate had power to sentence to a fine or imprisonment in default of payment of fine; he had under that sub-section no power to order a period of disqualification.

I have been unable to find any definition of the expression "punishable". It appears to me, however, to be a matter of common sense that disqualification for holding a driving licence is as much a punishment as fine or imprisonment. (It will be noted that I am not ruling whether or not endorsement of a licence is in any way a punishment). I am therefore satisfied that the Magistrate had no power to accept a plea of guilty by post in respect of an offence punishable under sub-section 2 of section 74 of the Road Traffic Ordinance because the offence was not punishable by fine only or by imprisonment not exceeding three months; it was also punishable by a period of disqualification for holding or obtaining a driving licence. Therefore in respect of the second charge also the conviction must be quashed and the charge remitted to the Magistrate to take the appellant's plea in person.

Appeal allowed. Convictions, sentences and consequential order quashed. Both charges remitted to the Magistrate, not necessarily the same, for retrial.

Appeal allowed.

Solicitors: S. Seenivasagam & Sons.

ALBAKHAR v. PUBLIC PROSECUTOR

[A. C. J. (Rigby J.) May 4, 1960]

[Alor Star—Kedah Criminal Appeal No. 21 of 1960]

Criminal Law — Penal Code, s.411 — Dishonestly retaining stolen property — Proof of possession.

This was an appeal against the conviction of the appellant on a charge of dishonestly retaining stolen property to wit, orchid plants. The only evidence of possession of the orchids which were proved to be stolen property against the appellant was that they were found in a house which the appellant occupied with the other members of his family. There was no evidence to show how they got there or when or by whom they were taken.

Held: the evidence was insufficient to show that the appellant had possession of the stolen property and he should not have been called upon to enter upon his defence.

Case referred to:—

(1) *Soo Sing v. Public Prosecutor* [1951] M.L.J. 143.

MAGISTRATE'S CRIMINAL APPEAL.

Chang Min Tat for the appellant.

Abdul Kadir bin Yusoff (Deputy Public Prosecutor) for the respondent.

Rigby J.: I allowed this appeal stating at the time my reasons for so doing. In deference to the learned Magistrate who tried the case and, indeed, in compliance with the provisions of section 319 of the Criminal Procedure Code, I now state in writing the grounds upon which the appeal was allowed.

The appellant, an 18 year old student, was convicted of dishonestly retaining stolen property, to wit, 7 plants of orchids which he knew, or had reason to believe, was stolen property, contrary to section 411 of the Penal Code.

For the prosecution to succeed it was necessary to prove:—

- (1) that the orchids had been stolen; and
- (2) that the appellant retained them knowing or having reason to believe that they had been stolen.

The first ingredient provided no real difficulty. Two witnesses, father and son, gave evidence. The son stated that on the evening of the 23rd October, 1959, he attended as usual to his father's orchids, and at 7 a.m. on the following morning he found more than 50 plants missing. On the 8th November, 1959, he was called to the police station, where he was shown a number of orchid plants. He identified 3 of those plants as part of the stolen orchids saying that those 3 plants had been given to him by his father. The father was also called to the police station. He lived with his son on the same premises from which the orchids had been stolen, but was away from his house on the night or early morning on which they were stolen. At the police station he was shown 19 pots of orchids. He purported to identify 17 of these pots, including the 3 already identified by his son, as part of the stolen property.

It was then necessary to prove that the stolen orchids, or part of them, were found in the possession of the appellant and that he had

retained them knowing, or having reason to believe, that they were stolen property. The only witness called to prove this essential ingredient of the charge was a Police Officer. The Officer stated that on the morning of the 7th November, 1959, "acting on information" he proceeded to the house of the appellant. There, he found 7 plants of orchids in pots. The Officer then said in evidence "I interrogated accused. He did not give a satisfactory explanation. I took possession of the 7 plants. Next day P.Ws. 1 and 2 identified the 7 plants in my presence."

The evidence for the prosecution consisted solely of these three witnesses.

Mr. Chang Min Tat, for the appellant, submitted that at the close of the case for the prosecution no *prima facie* case had been made out against the appellant and he should accordingly have been acquitted forthwith by the Magistrate without being called upon for his defence. The main ground upon which Mr. Chang based his contention was that there was at that stage, namely, at the close of the case for the prosecution, no evidence whatsoever that the plants had been brought to the house by the appellant and/or that they were in his possession as distinct from in the possession of any other of the members of the house in which he lived and in which the plants were found. The only evidence on the record from which possession might conceivably be inferred as against the appellant were the words of the Police Officer "I interrogated accused. He did not give a satisfactory explanation." But Mr. Chang submitted that although the interrogation by a Police Officer and the explanation offered by a suspect might have been admissible if the charge had been one under section 29 of the Minor Offences Ordinance, it was clearly not admissible in respect of the present charge under section 411 of the Penal Code, where an offence of theft had already been known to have been committed and had been reported to the police and the police had already started their investigations. Mr. Chang accordingly submitted that the contents of any statement which the appellant might have made to the Police Officer, in reply to his interrogation, was clearly inadmissible under section 113(i) of the Criminal Procedure Code. Since the statement itself was inadmissible then, *a fortiori*, the words of the Police Officer "He did not give a satisfactory explanation" were still more inadmissible since their only purpose and effect was necessarily and inevitably to prejudice the mind of the trial Magistrate by indicating that the appellant, when challenged by the Police Officer with possession of the plants, gave an explanation which did not satisfy the Police Officer.

Stripped of its inadmissible evidence the only evidence remaining against the appellant was

A the fact that 7 pots of orchids subsequently identified as the property stolen a fortnight previously were found in a house which the appellant presumably occupied in common with the other members of his family. There was no evidence whatsoever as to how they got there or when or by whom they were taken. It is B relevant to refer to the following passages in *Ratanlal's Law of Crimes*, 18th edition, at page 1036:—

"Where property is found in a house in the possession of more persons than one, mere discovery of any stolen property in that house is not in itself sufficient to prove that the possession was of any of those persons."

C and again, at page 1037:—

"Where stolen property is found in a house occupied by several persons, it is not enough to show that the property was found in the house to convict a member of the family who might have had nothing to do with bringing or keeping it there".

D There was clearly insufficient evidence to have established a *prima facie* case against the appellant and he should have been discharged at the close of the case for the prosecution.

The result of this decision may well be unfortunate. It is clear from the evidence which the appellant subsequently gave, when called upon for his defence, that the Police Officer was E accompanied to the appellant's house by another boy named Rahim. It is equally clear that it was Rahim who supplied the information which caused the Police to go to the appellant's house. If Rahim had been called as a witness for the prosecution — as, indeed, he should have been — there might well have been evidence before the learned Magistrate which, if he believed it, F would have fully justified a conviction of the appellant on the charge preferred against him. But under section 173(f) of the Criminal Procedure Code it is the bounden duty of the Magistrate to acquit and discharge an accused person if the evidence at the close of the case for the prosecution, if un rebutted, is not sufficient to warrant his conviction. Unlike the law applicable in England the vital deficiency in the prosecution evidence cannot be supplied by the evidence subsequently given by the accused when called upon — wrongly — to make his defence to the charge. (See the case of *Soo Sing & 2 Ors. v. Public Prosecutor*⁽¹⁾).

H It was for these reasons that I allowed this appeal, quashed the conviction, and ordered the fine to be refunded to the appellant.

I In conclusion, I would only add that the learned Deputy Public Prosecutor, with that fairness which the Court is entitled to expect, and usually receives, from Counsel appearing for the prosecution, conceded that he could not support the conviction.

Appeal allowed.